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No. 01-1181

Supreme Court, U.S.
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In The Supreme Court of the United States

SHARON GERNETZKE, *et al.*,

Petitioners,

V.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver*
Erik W. Stanley
Joel L. Oster
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, Fl 32750
(407) 875-2100
Attorneys for Petitioners

*Counsel of Record

14pp

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RESPONSE TO CLARIFICATION OF THE RECORD

In its Brief in Opposition (hereafter "Response"), the School District attempts to "clarify" the Statement of the Case contained in the Petition for Writ of Certiorari. Many of the attempted "clarifications" are not really clarifications at all, but are disputes in material facts or are disputes in facts that are not material to the issues in this case.

The District claims that the Bible Club knew nothing about Gernetzke's request to distribute literature, that Gernetzke made the request to distribute literature on her own behalf and that the Bible Club did not designate Gernetzke as the person to request to distribute religious literature. Response at 2-3. However, this directly contradicts statements in the record from both Gernetzke and Joseph Bezotte. In her deposition, Gernetzke was asked about her request to Principal Pulaski to distribute literature. The exchange was as follows:

> Q. Did you ask him whether you could distribute religious materials?
> A. Yes.
> Q. Did he ask you whether you wanted to distribute those on your own as opposed to on behalf of a club?
> A. Yes, and I said individually and as the club.

Gernetzke Deposition at 117. Additionally, Joseph Bezotte's deposition makes clear that Gernetzke was authorized to request for permission to distribute literature on behalf of the Bible Club.

> Q. Mr. Bezotte, I'm asking you what did Sharon - what conversations did you have with Sharon about the tracts?
> A. This is the conversation I had with Sharon.

Q. You discussed with her the fact that the Bible Club had authorized her to go?
A. Yeah....

Bezotte Deposition at 72. It is clear that Sharon had requested to distribute literature on behalf of the Bible Club and herself individually.

Additionally, The District takes issue with Petitioners' statement that Pulaski denied Gernetzke's request to distribute literature "largely because the literature was religious." Response at 2. Then the District continues in the same paragraph and admits that one of the reasons Pulaski denied the literature was because it was religious. *Id.*

Each of the other supposed "inconsistencies" or "mischaracterizations" identified by the District are either not at issue in this case or are not really mischaracterizations at all. For instance, whether the walls at Tremper were designated in 1998 or in 1995 or 1996 is immaterial. Response at 1. The fact remains that the walls were designated. Additionally, the District appears to take issue with Petitioners' statement that Pulaski is the Superintendent's designee having authority to approve/disapprove student literature requests at Tremper. Response at 4-5. However, in the same paragraph, the District admits that Policy 2440 gives Pulaski the discretion to make a professional judgment with regard to literature distribution on his campus. *Id.* at 5. Pulaski was also asked in deposition "And with regards to whether you can make a decision on the distribution of literature, would you agree that, as a Principal, you would be a designee of Dr. Johnson to make that decision on your campus?" to which Pulaski replied, "That is my understanding." Pulaski deposition at 44-45. The fact remains that Pulaski has been designated to make decisions about literature distribution on his campus and that the Board has given him that authority.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION FOR CERTIORARI ARE PROPERLY BEFORE THE COURT

The District argues that Issues Number 1 - 3 are not properly before the Court because they were not raised in the Court of Appeals. However, the District significantly overlooks the fact that these issues raised in the Petition were grounds of error asserted by the Petitioners related to the Seventh Circuit's opinion in this case. Each of the issues raised were errors committed by the Seventh Circuit.

This Court has stated, "The standard we have previously employed is that we will not review a question not pressed *or* passed on by the courts below. Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari." *U.S. v. Williams*, 504 U.S. 36, 42-43 (1992)(*quoting Springfield v. Kibbe*, 480 U.S. 257, 266 (1987)(dissenting opinion))(emphasis in original). "We have never suggested that the jurisdictional stipulations of §1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below... *Parties are not confined to the same arguments which were advanced in the courts below upon a federal question there discussed.*" *Illinois v. Gates*, 462 U.S. 213, 248 (1983)(White, J., concurring)(*quoting Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899))(emphasis in original). This Court's settled practice is to consider questions either pressed by a petitioner below or passed upon by a court below. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

The District argues that Issue number one relating to whether *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978) applies to an action brought against a governmental official for prospective relief only was not properly asserted in the courts below and has been waived. However, the Seventh Circuit made it very clear in its opinion that the result in this case might have been different if *Monell* only applied to the damages claim brought by Petitioners and not the claims for prospective relief. Indeed, the entire underpinning of the *Monell* issue before the Court would be different if *Monell* only applied to damages claims. The *Monell* issue has always been before the courts in this case. Petitioners are merely raising an argument regarding this issue that was, importantly, used as the basis for finding against the Petitioners in the Seventh Circuit.

Additionally, the District argues that Issue number two was never *argued* below by the Petitioners. *See* Response at 7. Again, the *Monell* issue was always before the courts below, and petitioners are merely *arguing* here that *Monell* should be readdressed in light of the Court of Appeals holding. *"Parties are not confined to the same arguments which were advanced in the courts below upon a federal question there discussed."* *Gates*, 462 U.S. at 248 (White, J., concurring)(emphasis in original). Additionally, it would make no sense to argue to the appeals court that *Monell* should be readdressed. *Monell* is binding precedent that the Seventh Circuit was obligated to follow absent any contrary opinion from this Court. The proper forum to argue for the readdressing of a binding Supreme Court precedent is in the Supreme Court.

Finally, the District argues that Issue number three regarding the incorporation of a "heckler's veto" into the Equal Access Act was never argued below and that Petitioners never argued below that the mural must materially and substantially interfere with school discipline before it could be censored. *See*

Response at 8. However, the Seventh Circuit clearly relied on a "heckler's veto" in its opinion denying the Bible Club mural. App. 3a-4a. The Seventh Circuit clearly and unambiguously stated that the "heckler's veto" rejected by the First Amendment "has not been carried over into the Equal Access Act." App. 3a. The Seventh Circuit then used this "heckler's veto" to insulate from liability the principal's decision to forbid the display of the cross which was based on his fear that a lawsuit might be brought because of the cross and that the cross would incite conflicts among students. App. 3a. Therefore, it is clear that this "heckler's veto" was clearly a basis for the Seventh Circuit's opinion. Petitioners have every right to argue that this basis for the opinion is incorrect and urge for its reversal. Each of the issues presented to the Court in the Petition for Writ of Certiorari are properly before the Court.

II. PETITIONERS' CLAIMS ARE NOT MOOT

The District argues that Petitioners' claims are moot because Gernetzke has graduated and Bezotte will graduate soon. Response at 9. Interestingly, the District only makes this argument with regard to Issue Number one presented by the Petition relating to whether *Monell* applies to claims for injunctive relief.[1] However, this issue is not moot.

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[1] Nowhere else in its Response does the District argue mootness. Therefore, the District concedes that at least with regard to each of the other issues raised by Petitioners, there are no mootness issues. Nor could there be a mootness issue with regard to these other claims. It is well settled that a damages claim saves a Plaintiff's case from mootness. *See Buckhannon Bd. & Care Home, Inc. v. Dep't. of Health & Human Services*, 532 U.S. 598, 608-09 (2001); *see also Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)(stating that a claim for damages, even nominal damages, saves a case from mootness); *Beyah v. Coughlin*, 789 F.2d 986, 989 (2d Cir. 1986)(holding that a Plaintiff's

As stated earlier, Sharon Gernetzke was authorized by the Bible Club to request permission to distribute literature and that the request was made both individually and on behalf of the Bible Club. *See* Gernetzke Deposition at 117; Bezotte Deposition at 72. Because this request was made on behalf of the Bible Club and the Bible Club authorized Sharon Gernetzke to make this request, the issue is not moot. This Court has recognized an exception to its mootness doctrine for cases presenting issues that are "capable of repetition, yet evading review." *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 399-400 (1975). This exception is limited to situations where the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same complaining party would be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). Both elements are present in this case.

The Bible Club continues at Tremper High to this day. The Bible Club members are still subject to the restrictions complained of by the Petitioners. Indeed, because the Bible Club members authorized and were part of the request to distribute literature, this issue will arise again with the Bible Club members. While the Bible Club itself was not a party to this case, it is clear in the record that Sharon Gernetzke and Joseph Bezotte were acting on behalf of the Bible Club members as well as themselves in requesting to distribute literature. Because this was not just an individual request to distribute literature, but also a group request on behalf of and authorized by the Bible Club, the issue was squarely before the courts below and survives to this day. Additionally, should the Bible Club members seek to distribute

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claims for nominal damages precluded a mootness argument); *O'Connor v. City and Cty. of Denver*, 894 F.2d 1210, 1215-16 (10th Cir. 1990)(holding a claim for nominal damages was not moot). Because Petitioners have advanced a damages claim, mootness is not an issue.

literature and be denied, they too will likely graduate before a final decision has been obtained. The same issue will happen to the same people in the future yet will be denied review because of graduation. This clearly meets the elements for an exception to the mootness doctrine. "There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if [this Court] should fail to resolve the constitutional issues...." *Norman v. Reed*, 502 U.S. 279, 287 (1992).

III. THERE IS A CONFLICT BETWEEN THE SEVENTH AND NINTH CIRCUITS REGARDING THE APPLICATION OF *MONELL*

The District argues that there is no conflict between the Seventh and Ninth Circuits regarding the application of *Monell* to the present case. It attempts to distinguish the Ninth Circuit's decision in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989) from the Seventh Circuit's decision in this case by stating that the *Chaloux* case involved only a claim for injunctive relief whereas this case involves a claim for both damages and injunctive relief. The District argues that the present case is different because *Chaloux* and its progeny involve solely claims for prospective relief. However, this attempt to distinguish *Chaloux* is misplaced and does nothing to alleviate the split among the circuits on the issue whether *Monell* only applies to suits for damages.

The operative and meaningful fact that clearly demonstrates the circuit split is that Petitioners' complaint in this case did contain a claim for injunctive relief. Therefore, the district court and the Seventh Circuit had, as an option, the ability to grant solely prospective relief as opposed to damages. This should be distinguished from a case that contained solely a claim for damages and yet the plaintiff argued that the court should have

awarded injunctive relief if it did not find a custom, policy or practice pursuant to *Monell*. That is not the case here. Petitioners clearly requested prospective injunctive relief. Therefore, the court could have awarded the injunctive relief and denied the damages under the *Chaloux* theory. The Seventh Circuit did not do so. This is error and is clearly at odds with the Ninth Circuit. This Court should resolve this conflict.

IV. RESPONDENTS' *MONELL* ARGUMENT ILLUSTRATES WHY THAT CASE SHOULD BE READDRESSED

Petitioners have argued that *Monell* should be readdressed to impose *respondeat superior* liability at least in the certain situation where there has been a clear grant of authority by a governmental entity to an official. In that instance, petitioners have argued that it makes no sense and indeed leads to inequitable results to deny *respondeat superior* liability. In response, the District argues that it falls squarely outside of *Monell's* requirement of a custom, policy or practice and, therefore, the Seventh Circuit committed no error justifying review by this Court. However, the District's argument makes Petitioners' case for readdressing *Monell*. The District states in its Response:

> The District does not consent to the imposition of *respondeat superior* liability under Policy 2440 by granting Dr. Johnson/his designees to "use professional judgment" in situations where there is no applicable District policy. Contrarily, if Johnson or his designees exercise their professional judgment in an unconstitutional manner, this Court has stated that the District would not automatically be liable under §1983, for liability would then rest on *respondeat superior*.

Response at 14-15. The District thus admits that it can grant authority to certain employees to act in absence of District Policy yet it can then stand back and remain insulated form liability when that employee acts unconstitutionally. The District argues that it has the best of both worlds. This inequity was never intended nor desired by *Monell* nor by §1983. *Monell* should be readdressed by this Court to impose *respondeat superior* liability in instances such as this.

V. THE EQUAL ACCESS ACT WAS INCORRECTLY INTERPRETED BY THE SEVENTH CIRCUIT

Finally, the District argues that the Equal Access Act was not interpreted to incorporate a "heckler's veto" into the Act and that the Act was interpreted consistently with Supreme Court precedent. It is difficult to understand how the District can argue that a "heckler's veto" was not incorporated into the Act by the Seventh Circuit when that court stated that, "The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by [§4071(f)]." App. 3a. The Seventh Circuit then stated that the prohibition on a "heckler's veto" in the First Amendment had not been incorporated into the Act. The Seventh Circuit most certainly expanded the Equal Access Act in ways it was never intended.

Additionally, the District's argument that this Court applied a "modified heckler's veto" in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), cannot be farther from the truth. Twice the District argues that the Seventh Circuit's interpretation of the Equal Access Act is consistent with *Good News Club* because that case, in the District's estimation, used a "modified heckler's veto" to proscribe religious conduct perceived by others as a possible Establishment Clause violation. *See* response at 22 n.9, 25-26. However, if the District had bothered

to read the whole sentence they quote from the *Good News Club* case, it would have clearly read that this Court stated, "**We decline to employ Establishment Clause jurisprudence using a modified heckler's veto,** in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club*, 533 U.S. at 119 (emphasis added).

All of the District's other arguments regarding the Equal Access Act relate to its belief that allowing a cross on the wall would cause a person to believe the cross bore the imprimatur of the school in violation of the Establishment Clause. Response at 23, 28-30. However, this argument has been soundly rejected by this Court in *Good News Club,* as quoted above. Therefore, the District is advancing an argument that is inconsistent with this Court's precedent. As the Seventh Circuit's opinion was also inconsistent with *Good News Club* and this Court's clear refusal to proscribe religious conduct under the Establishment Clause based on possible misperceptions of others, this Court should grant certiorari to resolve this inconsistency.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Mathew D. Staver, Esq.*
Erik W. Stanley
Joel L. Oster
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, Fl 32750
Attorneys for Petitioners

*Counsel of Record